**CASE NO.: 15-13224**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION,**

**Petitioner/Cross-Respondent,**

**V.**

**NATIONAL LABOR RELATIONS BOARD,**

**Respondent/Cross-Petitioner.**

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**ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD**
**REGION 12**
**CASE NOS. 12-CA-026644 and 12-CA-026811**

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# REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION

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## I. SUMMARY OF REPLY

Petitioner Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation ("G4S") respectfully submits its Reply Brief in response to the brief filed by Respondent/Cross Petitioner, the National Labor Relations Board ("Board"). For the reasons discussed below and in G4S' opening brief, the Court should grant G4S' Petition for Review of the Board's June 25, 2015 Decision and Order and deny the Board's Cross-Application for Enforcement.

The Board's Decision and Order is erroneous and unsupported by substantial record evidence. It improperly imposed a heightened burden of proof on G4S to establish that former lieutenants Thomas Frazier ("Frazier") and Cecil Mack ("Mack") possessed and exercised independent judgment to discipline, promote (through evaluation), direct, and assign. The Board provided no legitimate explanation for disregarding unrebutted testimony and documentary evidence demonstrating Frazier and Mack were statutory supervisors not protected by the National Labor Relations Act.

Even if Frazier and Mack were not statutory supervisors, which is incorrect, the Board further erred in assessing the propriety of their discharges. Contrary to the Board's findings, the evidence failed to establish G4S terminated Frazier or Mack because they engaged in protected concerted activity. This is not a case

where G4S discharged Frazier or Mack for exercising hallmark Section 7 rights, such as striking or testifying before the National Labor Relations Board. Rather, the Board makes an unsustainable leap to equate G4S' *perception* that Frazier and Mack failed to align themselves with management (ignoring that such conduct amounted to them shirking their job responsibilities) with protected concerted activity.

As a result of this incorrect finding, the Board erroneously failed to fully consider G4S' lawful motives for terminating Frazier and Mack. Specifically, the Board never considered G4S' explanation that it would have terminated both – even in the absence of protected concerted activity – because of poor job performance and failure to meet expectations in the Leadership Effectiveness Program (for which others not alleged to have engaged in protected concerted activity were terminated).

In sum, the Board's decision is not supported by the record evidence, nor is it supported by applicable law. Thus, G4S' Petition for Review should be granted and the Board's Cross-Application for Enforcement denied.

## II. ARGUMENT

### A. The Board Erred in Concluding Frazier and Mack Were Not Supervisors.

The Board's Opposition attempts to distinguish this Court's decision in Lakeland Health Care Assocs., LLC v. NLRB, 696 F.3d 1332 (11th Cir. 2012) is unavailing. Specifically, the Board attempts to point to insignificant factual differences between Lakeland and the instant case while ignoring the decision's critical teachings. This effort fails. As G4S noted in its opening brief, the Lakeland court held "the Board cannot ignore the relevant evidence that detracts from its findings." Id. citing Northport Health Svcs., Inc. v. NLRB, 961 F.2d 1547, 1550 (11th Cir. 1992). Moreover, "[w]hen [the Board] misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence." Id. (Internal citations omitted). Such is the case here.

#### 1. The Board Ignored Record Evidence, Imposed An Improper, Artificial Burden Of Proof, And Erroneously Concluded Frazier and Mack Lacked Independent Judgment to Discipline Security Officers.

##### *a. The Board Ignored Mike Mareth's Unrebutted Testimony Which Was Corroborated By Frazier and Mack.*

In its opening brief, G4S cited to the unrebutted testimony of Project Manager Mike Mareth's ("Project Manager" or "Mareth") establishing Frazier and Mack were supervisors. In concert with the Board's erroneous decision, the

Board's Opposition Brief unpersuasively argues, "Mareth's testimony lacks the specific evidence or examples necessary to show that lieutenants possess actual disciplinary authority over security officers."[1] (Opposition, at 21.) However, the Board disregards Lakeland, in which this Court specifically ruled that the Board may not ignore managers' undisputed testimony displaying their knowledge of a particular issue. Id. at 1348.

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[1] The Board's Opposition argues that "[a]s the Board found, and the hearing transcript supports, Mareth's testimony consists mostly of conclusory statements in response to leading questions from counsel." (Opposition, at 21.) The Board's Opposition points to several transcript pages of Mareth's testimony to support this incorrect argument. Notably, although Counsel for the General Counsel objected once to a purported leading question, that question was immediately withdrawn and there were no other objections on the grounds G4S' counsel was leading the witness. (V.I, Tr. 322-329.) "V.I Tr. ___" refers to the transcript of the April 4-6, 2011 Hearing.

Additionally, the Board's Opposition ignores Member Miscimarra's poignant explanation that:

> [Mareth's] testimony was corroborated by eight Employee Disciplinary/Corrective Action Notices recording various forms of discipline issued to five bargaining-unit guards by seven different lieutenants. These disciplinary notices covered a range of offenses--tardiness, absenteeism, failure to report to training on time, and damaging a vehicle--and the sanctions imposed ranged from oral warnings and written reprimands to 1-day suspensions. This discipline was issued pursuant to the Respondent's attendance and progressive discipline policies, which apply to discipline issued by all levels of the Respondent's management. **Those policies furnish guidelines for the level of discipline appropriate to various offenses, but they also recognize that a guard may commit an unlisted offense or that following the guidelines may not be warranted in some instances. Indeed, one offense listed at two progressive-discipline levels—'[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*' (emphasis added)--explicitly requires independent judgment.**

(V.III, 24, at 5) (Emphasis added)(Internal citations omitted). "V.III, ___" refers to the June 25, 2015 Decision at 24 in V.III of the Agency Record.

The Opposition next disingenuously argues the majority did not discredit Mareth's testimony. Instead, the Board argues the majority credited his statements, "but found that they lacked the specificity needed to show supervisory status." (Opposition, at 22.) This is a distinction without a difference and ignores the record as a whole. Mareth testified that lieutenants, including Frazier and Mack, could issue discipline without seeking approval. Unsurprisingly, the Board's Opposition does not address Member Miscimarra's dissent which described Mareth's specific testimony demonstrating lieutenants exercised independent judgment in disciplining subordinates:

> Additionally, Mareth testified that where offenses are listed at two different levels of progressive discipline, lieutenants have discretion to impose discipline at either level. …
>
> [Mareth] testified that lieutenants could impose all forms of progressive discipline except termination without advance approval of a captain or other higher-ranking officer. **He also explained that lieutenants, on their own, could decide whether to issue discipline or alternatively to let an offense go unpunished or to use the incident as a 'coaching' opportunity.**

(V.III, 24, at 5) (Emphasis added).

The Board's Opposition attempts to undermine Mareth's credible and unrebutted testimony because he could not "explain the lieutenants' thought process when they issue disciplinary notices, including how they decide whether to ignore an infraction, or which factors they consider in determining whether a violation is better addressed by a coaching, an oral counseling, or a written

warning." (Opposition, at 27.) This, however, is exactly the point. Aside from the fact that evidentiary rules would bar Mareth from speculatively testifying about what lieutenants' thought processes were, the Board acknowledges *there are thought processes* that factor into whether discipline should be issued in the first place.[2] This inherently recognizes that lieutenants do decide whether to issue discipline in the first place, and it is this "thought process" which establishes the independent judgement requisite to supervisory status.

It likewise defies credulity that Mareth's testimony lacked sufficient specificity when it was corroborated by both Frazier and Mack. As Member Miscimarra pointed out:

> And [Mareth's] testimony on disciplinary authority was *corroborated* by Frazier and Mack themselves. Frazier admitted that, as a lieutenant, he 'had the authority to issue oral and written warnings' and 'to issue discipline at least at certain levels.'
>
> Both [Frazier] and Mack acknowledged that they had signed a 'Supervisory Requirements' document confirming that their job duties included imposing 'progressive discipline.' Frazier also conceded that he could have exercised 'independent judgment' in issuing discipline, but he never saw the need to issue discipline. No credited testimony contradicts this evidence.

(V.III, 24, at 5.)

[2] The Board also suggests that G4S opted not to have the lieutenants who signed the disciplinary notices testify during the hearing. However, the Board ignores that any such testimony would be unnecessarily duplicative because the documents stand for themselves.

Incredulously, the Board's Opposition attempts to brush off these admissions, contending "the terms used in supervisory-determination cases (*e.g.*, supervisor, independent judgment, discipline, to assign, etc.), have very specific meanings under the Act, of which laypersons may not be aware." (Opposition, at 33.) Thus, according to the Opposition, "[t]hat is why Frazier's positive response … when G4S's counsel asked if he had 'the authority to issue oral and written warnings…,' does not mean he possessed disciplinary authority within the meaning of the Act." (Opposition, at 33.) Notably, the Board cites to no authority for the proposition that a witness' tacit admissions lack legal significance because the witness is purportedly a layperson.[3] Common sense, however, establishes that Frazier's understanding is the crux of this whole matter. He understood he had the authority to discipline. There is no evidence he never had the opportunity to do so or declined to do so. Accordingly, the Board's findings cannot survive this Court's scrutiny given the Board's disregard of this undisputed evidence.

### ***b. The Board Improperly Elevated G4S' Burden To Establish Supervisory Status.***

The Board next contends G4S confuses the Board's standard of review with G4S' evidentiary burden. The Board is wrong. In this case, G4S proffered uncontradicted documentary evidence and Mareth's testimony establishing Frazier

[3] Notably, on redirect examination, Counsel for the General Counsel did not ask Frazier any questions designed to contradict this admission. (V.I, Tr. 230-234.)

and Mack's independent judgment to issue discipline. Critically, as noted above, Frazier and Mack *corroborated* this evidence. Nevertheless, without any legitimate rationale, the Board discredited Frazier and Mack's admissions that they possessed the authority and independent judgment to discipline subordinate employees. The Board's disregard of this evidence demonstrates the Board improperly set an unspecified higher burden of proof for G4S to satisfy Frazier and Mack were statutory supervisors. The Opposition makes manifest that the only way G4S could have prevailed before the Board on this issue was to disprove rank speculation as to what lieutenants did and did not do at Turkey Point. Such an abuse of discretion should not be countenanced by this Court. See Lakeland.

### *c. The Board Improperly Twists The Record To Support Its Erroneous Conclusions.*

The Board's Opposition also argues "the notion that lieutenants have discretion to choose whether to issue discipline is belied by G4S's own claim that it discharged the discriminatees in part specifically because they failed to discipline security officers." (Opposition, at 30.) This is an oversimplification of the record. There is a clear difference between: (a) a lieutenant properly opting not to issue discipline because a particular infraction is independently determined by the lieutenant not to have transpired or because there are legitimate explanations as to why discipline should not be issued in response to an infraction (*i.e.*, reckless

driving to rescue a wounded officer); and (b) an abdication of the responsibility to issue discipline where it is warranted.[4]

Similarly, the Board's Opposition argues that the Board "did not reject any evidence of discipline by lieutenants as 'sporadic.'" (Opposition, at 24.) This is patently untrue. Frazier and Mack were terminated in part because they were not exercising their authority, such as issuing discipline to officers under their command. However, the Board held against G4S the fact that it did not introduce discipline issued by either Frazier or Mack. Nevertheless, as this Court noted in Lakeland, "[t]he frequency with which an employee exercises disciplinary authority—authority that, in an ideal workplace, will be exercised infrequently or sparingly—cannot be determinative of the existence of supervisory authority." 696 F.3d at 1338. This is particularly true where, as here, Frazier testified he never had reason to issue discipline and there is no evidence Mack shirked from doing so. (V.III, 24 at 5.)[5]

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[4] The Board's reliance upon Wackenhut Corp., 345 NLRB 850 (2005) is misplaced. The Board's Opposition argues that "despite G4S's prior experience litigating this very issue the Board found that the *Wackenhut* record was 'considerably more substantial' than in this case." (Opposition, at 32.) This argument presupposes that Wackenhut was correctly decided. G4S submits that it was not for the reasons set forth in this brief as well as its opening brief.

[5] The Board likewise argues that lieutenants *always* confer with captains before issuing discipline. (Opposition, at 27.) Again, this argument reads the record in a vacuum. As Member Miscimarra explained:

> The majority … asserts that Frazier was required to get a captain's review before issuing discipline, citing language from one of Frazier's performance evaluations that indicates that *lieutenants* would have prepared the forms. That evaluation

### *d. The Board Ignores That G4S' Detailed Policies Do Not Prohibit Lieutenants From Exercising Independent Judgment When Issuing Discipline.*

The Board's Opposition likewise focuses on the fact that the disciplinary notices issued by lieutenants were predicated on violations of G4S's attendance policy, "which is exhaustively detailed and prescribes specific procedures and discipline for every conceivable type of absence." (Opposition, at 25.)

Thus, according to the Board, lieutenants cannot possibly exercise independent discretion because they are directed how to address every possible infraction. Such rigidity flies in the face of reality and relies upon the speculative and faulty assumption that lieutenants never deviate from policies.[6] The Board then

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> states: 'Have more involvement with the Security Officers when disciplinary actions need to be issued. Review and use WNS policy 108 … for guidance when issuing any disciplinary actions and have the Captain review the disciplinary [sic] prior to giving it to the Officers.' **Read in context, this is not an instruction to get a captain's review before issuing discipline, as the majority contends. Rather, it is a criticism of Frazier for being insufficiently involved in the disciplinary process, and a directive to issue discipline as the duties of his position require.**

(V.III, 24, at 6) (Emphasis added).

Moreover, even if Frazier and Mack were instructed to submit disciplinary actions for a captain's review prior to issuing them to officers, it does not follow that Frazier and Mack lacked the authority to make effective recommendations as to the issuance of discipline with independent judgment.

[6] The Board argues "the policy specifically states that, '[w]hen it is not practical to follow these guidelines or if an unlisted event occurs, *the Project Manager/DA* will consult with [G4S] for guidance….' In other words, the final decision in unclear cases is reserved to the project manager (Mareth), and only after consultation with his superiors at G4S." (Opposition, at 28). This is illogical. Not every conceivable violation is listed but one would be hard pressed to argue that Mareth would need to consult with higher authorities before effectuating a common-sense adverse employment action.

baselessly argues that "the attendance policy provides that lieutenants are 'responsible for … [e]nsuring that all authorized and unauthorized absences are documented,' leaving no discretion to ignore violations." (Opposition, at 25.) However, this contention ignores that merely because a policy directs that an absence needs to be documented, it does not follow that the absence will necessarily lead to a disciplinary violation. In sum, according to the Board's logic, whenever an employer has detailed policies and practices in place, *nobody* can exercise discretion because a policy must govern. This finding clearly defies common sense.

Further, the Board notes that "G4S's disciplinary policy specifically states that 'careless or reckless driving' is a Level II offense that requires a written warning…. [and] [t]hus, there is no evidence that the issuing lieutenant had any discretion to decide which level of discipline to impose, let alone whether to impose discipline at all." (Opposition, at 26.) The Board is wrong because, in this case, *someone* would have to make an informed judgment as to whether particular conduct constituted "careless or reckless driving" in the first place. In other words, merely because a policy prohibits certain conduct does not mean there is not some level of subjectivity in determining whether an individual has engaged in prohibited conduct in the first place, and even presuming he or she has done so, whether discipline is warranted. This is precisely why, contrary to the Board's

erroneous argument, Mareth could only state that the severity of a particular infraction, in the lieutenant's independent judgment, would dictate the appropriate discipline, if any, issued to a security officer. (Opposition Brief, at 29-30.)

**2. The Board Erred In Concluding Lieutenants Lacked The Independent Judgment To Assign Officers.**

The Board's Opposition also erroneously contends lieutenants did not exercise independent discretion in assigning security officers. Once again, the Board ignores the record evidence.

As Frazier admitted, lieutenants have the authority to transfer security officers from one post to another without consulting with a supervisor before doing so, posts that at least some officers find more preferable than others. (V.I, Tr. 217-219.) The Opposition ignores this admission and instead argues "Frazier testified only that security officers request switches based on personal preference…, not based on an objective measure of the relative desirability of each post." (Opposition, at 38.)[7] The Board attempts to paint a distinction without a difference because it would defy logic to suggest that a security officer would have a personal preference for a "bum" as opposed to "plum" assignment. (V.I, 217-219.)[8]

[7] The Board attempts to deflect attention away from the undisputed fact that some officers prefer some posts over others, and lieutenants have the authority to reassign officers and do so with independent judgment. Thus, whether an objective person finds one assignment superior to another is irrelevant.

[8] The Board likewise ignores its own precedent which holds that assignment of work is a mandatory subject of bargaining. See WCCO-TV, 362 NLRB No. 101 (2015). Thus, work

Accordingly, contrary to the Board's erroneous findings, lieutenants are vested with independent discretion to assign employees in accordance with Section 2(11) of the Act.

### 3. The Board Incorrectly Found Evaluations Issued By Frazier and Mack Did Not Affect Subordinates' Promotional Opportunities.

As G4S explained in its opening brief, the Board ignored that lieutenants complete annual and quarterly evaluations of security officers and discuss those evaluations with officers before any involvement by higher management. (V.I, Tr. 84, 205-206, 295, 328; V.II EE 4 and 10.) These facts are uncontroverted, as is the fact that lieutenants regularly and consistently issue evaluations without consulting upper management, and the evaluations conducted by lieutenants generally are the only evaluations of security officers. (V.I, Tr. 84-85, 88-89, 206-207, 295-296, 330.)

Contrary to what the Opposition argues, the applicable standard is not whether an evaluation, by itself, affects an employee's promotion, but whether an evaluation "affects" an employee's promotion. It is irrelevant that evaluations completed by lieutenants are not the only factor considered by the promotions board. In fact, according to the Board's logic, in order for evaluations to factor into whether an individual is a supervisor under the Act, the evaluation must be the *only*

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assignments cannot be unilaterally implemented, absent some form of waiver, specifically because they are discretionary in nature. The Board cannot have it both ways.

criterion upon which any changes to an employee's job status can be predicated. This defies common sense. Chairman Hurtgen correctly explained the standard in Willamette Indus., 336 NLRB 743, 743, n. 4 (2001):

> The Chairman agrees with his colleagues, however, that in order for individuals to be supervisors based on their authority to evaluate employees, their evaluations must be shown to directly affect and effectively recommend changes in the rated employees' job status, e.g., wage increases, extended probationary periods, or termination.

Here, Mareth testified, without contradiction, regarding four officers, whom he identified by name, for whom evaluations played a role in successful promotions. (V.I, Tr. 330, 333.) Mareth also testified that the same thing had occurred with respect to eight other officers in the preceding one and one-half years. (V.I., Tr. 333-334.) Thus, the undisputed record evidence, which the Board ignored, demonstrates lieutenant evaluations directly affect subordinate chances of promotions. Indeed, if only lieutenants issue evaluations, it stands to reason that those evaluations must receive strong consideration in the promotion process – there is little else to consider. Therefore, the Board's findings on this point are unsustainable and should be disregarded by this Court.

### 4. The Board Incorrectly Found Frazier and Mack Lacked The Authority To Responsibly Direct Security Officers.

In its opening brief, G4S relied upon undisputed testimony to establish that lieutenants are responsible for ensuring the quality of work performed by security officers and lieutenants who do not fulfill this responsibility may be disciplined or

evaluated poorly, which can affect their opportunity for promotion. This evidence demonstrated lieutenants are responsible for the quality of the performance of security officers and, if the lieutenants do not fulfill that responsibility, they may be coached, disciplined or discharged. (V.I, Tr. 331-332, 334.) For example, lieutenants are required to conduct certain drills for their security officers. (V.I, Tr. 335.) Four lieutenants (including Espinoza and Jean-Baptiste) were counseled on their failures to conduct drills. (V.II, EE 18 at 1-3, 7.) One lieutenant received the lowest score possible (1 out of 4) in a category on his evaluation for similar failures, a score that can affect his future promotion opportunities. (Id. at 7.)

The Board's Opposition suggests that "responsible direction does not turn on whether a subordinate's failures can be attributed to that person's supervisor…. [but] [i]nstead, the test is whether the employer takes the extra step of holding supervisors accountable for the performance of their subordinates." (Opposition, at 40.) The Board's Opposition thus ignores that if a subordinate officer was improperly trained, and exhibited poor performance because of that lack of training, the training officer would be the direct cause of the subordinate officer's shortcomings. Thus, if a lieutenant fails to properly train subordinates, the lieutenant is in fact *directly responsible* for any substandard performance that may result. (V.I, Tr. 333-336.) As noted above, the failure to conduct drills could lead to counseling which may affect a lieutenant's promotion opportunities.

The Board also ignored that lieutenants exercise independent judgment in "responsibly directing" security officers because they decide how to counsel officers and suggest ways for improvement. (V.I, Tr. 201, 207.) The Opposition notes the Board never made a finding regarding this issue and argues G4S' argument is "beside the point." (Opposition, at 41). However, it is specifically because the Board failed to address this argument that it ignored a basis for the conclusion that the lieutenants had the independent discretion to responsibly direct subordinate officers. As a result, once again, the Board has demonstrated how it improperly set a higher burden of proof in this case.

**5. The Majority Ignored Secondary Indicia of Supervisory Status.**

Finally, the Board's Opposition claims G4S erred in relying upon secondary indicia of supervisory status. Secondary indicia of supervisory status are pertinent when at least one of the primary indicia is also evident. E & L Transp. Co. v. NLRB, 85 F.3d 1258, 1270 (7th Cir. 1996), cited by the Board, is instructive. There, the court held:

> Although not determinative on their own, where one of the enumerated indicia in § 152(11) is present, secondary indicia support a finding of statutory supervisor…. Because the record shows that [the individual] exercised the authority to discipline fellow employees and maintained multiple secondary indicia of supervisory status, the Board erred in holding that he was not a statutory supervisor.

As described supra, there is clear evidence of several primary indicia of supervisory status. As such, the Board erred by failing to consider the undisputed

facts that lieutenants: earn more money than security officers; receive additional training, and are included in management meetings; are viewed as supervisors (including by the Union president); and if lieutenants are not supervisors, then each captain would be responsible for more than 40 employees, which is illogical. See e.g. American River Transportation Co., 347 NLRB 925, 927 (2006); Burns Security, 278 NLRB 565, 570 (1986); (Opening Brief, at 40.)

* * *

Accordingly, based on G4S' opening brief and the arguments raised herein, the Board erred in finding Frazier and Mack were not statutory supervisors.

***B. Even if Frazier and Mack Were Employees Protected by The Act, The Record Evidence Establishes G4S Lawfully Terminated Their Employment.***

The Board concluded G4S unlawfully disciplined Frazier and Mack because they purportedly raised complaints on behalf of subordinates. The authority the Board relied upon in reaching this conclusion is inapplicable because it controls only in situations in which an employer disciplines an employee exclusively because of his or her participation in protected concerted activity. Here, as noted in G4S' opening brief and ignored by the Board's Opposition, G4S discharged Frazier and Mack (as well as other lieutenants who are not alleged to have engaged in protected concerted activity) for poor job performance and failing to meet the expectations of G4S' Leadership Effectiveness Program. Thus, the Board was

required to *fully* evaluate G4S' motives under a "mixed-motive" analysis.[9] Had the Board done so and considered the weight of the credible evidence of record, the Board would have found both discharges lawful.

Under the mixed-motive analysis, G4S conclusively demonstrated: (1) there was no causal connection between Frazier and Mack's purported protected concerted activity and their discharge; and (2) G4S established the affirmative defense that it would have discharged them irrespective of purported participation in protected concerted activity.

**1. The Board Applied An Incorrect Analytic Framework.**

As noted above, the Board's Opposition argues "[t]he discriminatees raised to G4S a myriad of concerns, on multiple occasions, about the security officers' conditions of employment, including inadequate bathroom facilities, lack of water, bulky vests, time spent standing in the sun, uncomfortable desk furniture, favoritism, and unfair treatment." (Opposition, at 43.) However, the Opposition fails to point to any evidence suggesting G4S terminated Frazier or Mack *exclusively* because they purportedly raised complaints on behalf of their subordinate officers. In fact, such a conclusion is belied by evidence in the record. Frazier admits he brought issues and concerns to the attention of management from

[9] The Board only performed the Wright Line analysis for Mack's termination and only in connection with the issue of whether G4S lawfully terminated him for using foul language. The Board never fully considered the evidence, referenced infra and in G4S opening brief, that G4S would have terminated both Frazier and Mack because of their poor job performance and Leadership Effectiveness Program ratings.

1989 through his termination, and Mack admits that he raised similar issues from 2002 until his termination. (V.I, Tr. 169 (Frazier has "been bringing up issues to management ever since I started working out there over 20 years ago. I've never had a problem speaking to management, bringing up concerns that needed to be addressed, so it continued through my entire tenure at Turkey Point."); V.I, Tr. 276-279 (Mack raised such issues as a security officer and lieutenant).) It strains credulity to suggest G4S suddenly no longer tolerated this conduct and decided to terminate Frazier and Mack.

Undeterred, the Board impermissibly extended the limits of what constitutes protected concerted activity to support its erroneous findings. As discussed infra, Frazier and Mack, along with other lieutenants who are not alleged to have engaged in protected concerted activity, were terminated based upon poor job performance and the results in G4S' Leadership Effectiveness Program. That program involved components other than reporting and responding to employee concerns. Notably, Frazier's Leadership Effectiveness Program report contained unfavorable comments that he "fail[ed] to balance the need of the organization with his sensitivity to individuals" and his "natural sensitivity to individuals is an overused strength with negative impact." (Opposition, at 47.) Mack's Leadership Effectiveness Program report faulted him for being "more ' a team member' than a team leader." (Opposition, at 50.) Even liberally construed, Frazier's "sensitivity"

towards other individuals and Mack's failure to be a team leader cannot be considered rebukes for purportedly engaging in protected concerted activity.

Critically, the Board acknowledges, as it must, that Frazier's termination notice states that G4S terminated him for "Failure to meet satisfactory leadership expectations." (Opposition, at 8.) Similarly, the Board's Opposition notes Mack's termination notice states that he was "involved in an incident with the client that involved undesired behavior…[and]…[***a]s a part of the process management completed a review of [his] personnel file. As a result of the review it is management's perspective that [his] performance does not meet satisfactory job performance or behavior standards."*** (Opposition, at 10)(emphasis added).

These rationales clearly demonstrate G4S did not terminate Frazier or Mack specifically for engaging in protected concerted activity and that the Board's finding that G4S demonstrated animus toward them is completely unsupported by the record. Accordingly, as discussed infra, the motive for terminating their employment should have been fully evaluated under the mixed motive analysis set forth in Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 889 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

Under the analytical framework set forth in Wright Line, to establish a *prima facie* case of discrimination under Section 8(a)(1) of the Act, a charging party must show: (1) he was engaged in protected concerted activity; (2) the employer knew

of that activity; (3) the employer took an adverse employment action; and (4) there is a link or nexus between the protected activity and the adverse employment action. If a prima facie case is established, the burden shifts to the employer to prove the affirmative defense that it would have taken the same action irrespective of the charging party's participation in protected activity. Finally, there must be a showing sufficient to support the inference that a charging party's protected activity was a substantial or motivating factor in the alleged adverse employment action. Wright Line, 251 NLRB at 1089.

As noted in its opening brief, recent Board cases have erroneously suggested that the fourth prong is not part of the General Counsel's initial burden. Auto Nation, 360 NLRB No. 141 (2014) (but see Miscimarra dissent). However, at least two appellate courts have rejected the Board's position on this specific issue. See AutoNation, Inc. v. NLRB, 801 F.3d 767, 775 (7th Cir. 2015); Nichols Aluminum, LLC v. NLRB, 797 F.3d 548, 554 (8th Cir. 2015). The Board argues that this Court has not reached a similar finding and thus "[i]t is unsurprising… that the only precedent G4S can rely on for its argument is an out-of-circuit case." (Board Opposition, at 50). The Board ignores that the applicable standard has only been modified recently, and thus, the issue likely has not had an opportunity to be litigated before other Circuit Courts of Appeals yet. Regardless, G4S urges this

Court to join the Courts of Appeals for the Seventh and Eighth Circuits on this point.

In any event, the Board's Opposition does not challenge G4S' argument that there is insufficient evidence in this case of a link or nexus between Frazier and Mack's purported protected concerted activity and the adverse employment actions they suffered. Therefore, G4S stands by the arguments asserted in its opening brief, at p. 43-50.

**2. Frazier and Mack's Terminations Were Lawful Under Wright Line.**

Even if the Board properly found participation in protected concerted activity was a substantial or motivating factor in Frazier and Mack's discharge, which it was not, G4S satisfied its burden to establish the affirmative defense that it would have taken the same action in the absence of participation in protected concerted activity. The pertinent standard under Wright Line, which the Board and ALJ failed to evaluate, is whether an employer would have taken an adverse employment action against an employee in the absence of protected concerted activity. 251 NLRB at 1089. Had this analysis been applied, the evidence demonstrates G4S would have satisfied its burden for the reasons stated at pages 50-52 of its opening brief.

The Board disingenuously intimates that it "considered the [Leadership Effectiveness Program Report] and properly viewed it as supporting evidence for

the unlawful discharge, rather than the affirmative defense G4S claims it is." (Opposition, at 46.) However, the underlying decision does not evidence such an analysis. Thus, the Board again contravened this Court's teachings in Lakeland by ignoring clear evidence that G4S would have terminated Frazier and Mack for legitimate non-pretextual reasons, i.e., because of their poor job performance and inadequate Leadership Effectiveness Program ratings.[10] Critically, the Board's Opposition does not challenge the legitimacy of the explanations. Accordingly, because the Board's findings on this issue are not supported by substantial evidence, the Petition for Review should be granted and enforcement denied. (Opening Brief, at 52.)

## III. CONCLUSION

Based upon the foregoing, the Board's decision is not supported by substantial evidence on the record as a whole, nor is it supported by controlling precedent. Wherefore, G4S requests that this Court vacate the NLRB's Decision and Order in all respects, grant G4S' Petition for Review and deny the NLRB's Cross-Application for Enforcement.

[10] The Board cannot now assert that the performance-related reasons for Frazier and Mack's discharges were pretextual given that the Board failed to evaluate these legitimate rationales below. Therefore, at the very least, this Court should direct the Board to evaluate the evidence G4S proffered so it might have an opportunity to conclude that G4S has satisfied its Wright Line burden.

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,538 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that the foregoing Brief of Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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I hereby certify that on January 25, 2016, I caused to be served a true and correct copy of the within and foregoing **PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF** via the Court's electronic case filing system which will automatically serve the following counsel of record:

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